In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5498

NATIONAL SURETY COMPANY, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Opening Brief

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Appellant's Opening Brief

This is an appeal from a judgment in favor of the United States on a contested scire facias proceeding on a bail bond. The testimony is short and uncon-

tradicted. The case was tried before the court without a jury, a written waiver of jury having been made as required by law (Tr. 13).

STATEMENT OF CASE

Pleadings

Writ of scire facias. The writ of scire facias (Tr. 2-3) alleges that on *February 24th,* 1925, a bail bond for $750.00 was executed by Eugene Rodgers and the National Surety Company (appellant); that said bond was conditioned for the appearance of Rodgers before the district court at Seattle, "during the *May* 1926 term" of said district court and from time to time and term to term thereafter, to answer a charge of the United States *exhibited* against him; that said bond was filed on February 28th, 1925; that thereafter, on January 3rd, 1927, and at a proper term of court, Rodgers being called to answer said charge, came not but made default; that thereupon, on motion of the United States it was considered that Rodgers and the National Surety Company forfeit to the United States the sum of $750.00 according to the terms of said bond, unless they show cause to the contrary. Then follows the command to show cause why the forfeiture nisi should not be made absolute.

Amended Answer (Tr. 4). Paragraph I of the amended answer admits that on February 24th, 1925, the defendant executed a $750.00 bail bond for Rodgers, but denies that said bond was conditioned for appearance of Rodgers before the district court during the May 1926 term, or any other time. And denies each and every allegation of said writ.

First Affirmative Defense (Tr. 5) alleges that Rodgers complied with each and every term and condition of said bond of February 24th, and said bond was thereby terminated.

Second Affirmative Defense (Tr. 6). Paragraph I alleges that the bond of February 24th, 1925 required Rodgers' appearance before a commissioner; that Rodgers appeared as required, and that said commissioner bound Rodgers over to the district court and required him to file a final bond for appearance before the district court; that Rodgers thereupon did file such a final bond, on February 27th, 1925, and was released thereon; that thereby the first bond was released.

Paragraph II (Tr. 6) alleges that said final bond of February 27th was not conditioned for the appearance of said Rodgers "during the May 1926

term of said court and from time to time and term to term thereafter," as set forth in the writ of scire facias; and denies that said Rodgers was called to come into court and answer the charge brought against him at any time; and denies that said Rodgers made default under said bond.

Third Affirmative Defense alleges that said bond is void (Tr. 7):

> "That the bond filed in this cause is null and void and of no affect whatsoever, for the reason that the condition of the bond, as it appears upon the face thereof, was that the said defendant, Eugent Rodgers, should appear and answer as follows: 'On the ..... day of ..... term, to be begun and held in the City of Seattle in said District on the ..... day of the present term 1925, and from time to time and term to term thereafter'; that said bond is void for the reason that no definite date is set for the appearance of said defendant."

The Fourth Affrmative Defense (Tr. 8) alleges:

> "That said bond was executed on the 27th day of February, 1925; that said bond is, on its face, conditioned for the appearance of the defendant on the ..... day of ..... term to be begun and held at the City of Seattle in said district on the ..... day of the present term, 1925, and from time to time and term to term thereafter, to which the case may be continued; that said Eugene Rodgers was not called to ap-

pear during said 'present term,' nor at any time during said 'present term,' nor was said defendant, Eugent Rodgers, called during the following term or at any term during 1925, nor at any term during 1926, nor at any time until the 3rd day of January, 1927, as set forth in said writ of scire facias herein; that by reason of said facts said Eugene Rodgers did not violate the conditions of his said bond, and said defendant was never called at any proper term of said court."

Fifth Affirmative Defense alleges (Tr. 8):

"That at the time said bond was executed by the National Surety Company, said bond provided for the appearance of said defendant on the ..... date, 1925, and from time to time thereafter; that after the delivery of said bond, and without the knowledge or consent of the National Surety Company, said bond was materially altered and changed by the addition therein of the words 'present term,' and by the addition of the words 'term to term'; that the said National Surety Company is informed and believes that said additions were made in ink thereon after the delivery of said bond, by R. W. McClellan, the United States Commissioner, to whom the said bond was offered for approval; that said changes were made without the authority or approval of the National Surety Company; that said alterations and changes increase and enlarge the liability of the National Surety Company and are material alterations; that by reason of said alterations the liability of the National Surety Company on said bond was and is terminated, and said bond became null and void."

Sixth Affirmative Defense (Tr. 9) alleges:

"That said bond so filed in this cause was and is null and void by reason of the following facts, to-wit: That said bond, on its face, provides as follows: That said defendant is required 'then and there to answer the charge of having on or about the ..... day of ..... A.D. 192.., within said district, in violation of section .... of the ..... (Act of.....) (Criminal Code) (R. S.) of the United States, unlawfully violating the National Prohibition Act;' that by the terms of said bond this defendant, Eugene Rodgers, was not bound to answer any charge of whatsoever kind or nature under the laws of the United States; that by reason of the failure of said bond to provide for the defendant's answering for a definite and known or specific charge under the laws of the United States, said bond was and is null and void and there is no liability whatsoever on the surety, and National Surety Company; that by reason of the foregoing facts said Eugene Rodgers was not called to answer any charge and there being no charge mentioned in said bond, said Eugene Rodgers did not violate the condition of said bond."

Seventh Affirmative Defense (Tr. 10) alleges:

"That if the condition of said bond was that the defendant answer to any charge whatsoever against him, then he was only bound by said bond to answer a single charge; that instead of filing a single charge against said defendant, the said plaintiff, United States of America, on the 30th day of September, 1926, filed an information against said defendant in the above entitled action, in two counts, charging the said

defendant with two violations of the National Prohibition Act, to-wit: On the first count, unlawfully possessing intoxicating liquors on the 21st day of February, 1925, and on the second count, unlawfully maintaining a common nuisance by manufacturing and selling intoxicating liquors on February 21st, 1925, at the premises known as 101½ Occidental Avenue, Seattle; that by reason of the plaintiff's having filed more than one charge against the defendant in the above entitled action and under said bond, the risk of the surety was greatly increased; that by reason of said facts the liability of said surety was and is terminated, and said surety was and is released."

Seventh Affirmative Defense (Tr. 11) alleges:

"That no notice of whatsoever kind or nature was given to the National Surety Company to produce said defendant, prior to the date of forfeiture herein; that said forfeiture was and is premature and improper, in that said action was set for trial on February 8, 1927, and thereafter continued to March 8, 1927, and thereafter continued to March 15th, 1927, all of which dates are subsequent to the date of the alleged forfeiture of said bond."

REPLY

No reply was made to the amended answer.

BILL OF EXCEPTIONS (Tr. 21).

Upon the trial evidence was produced and the following procedure occurred:

Plaintiff's case: Mr. Simon (district attorney) offered in evidence the bond, exhibit 1, (Tr. 26) to which an objection was made that it was not the bond on which the writ was brought—the writ being brought on the bond executed February 24, 1925, and the bond offered being dated February 27, 1925. Thereupon plaintiff moved to amend the writ changing the date alleged from February 24th to February 27th, to which an objection was made, as follows: (Tr. 21).

> "On the ground that the writ referred to the bond executed on the 24th and not on the 27th, and on the further ground that the bond of February 24th mentioned in the writ is on file, and that the answer filed to that bond has not been controverted and nothing done."

The amendment was allowed and the bond admitted in evidence over objection, and the exception of the defendant noted.

It was then admitted that defendant executed the bond, exhibit 1, and that it was filed February 28th. Plaintiff then read into evidence certain lines from the clerk's docket in Cause No. 11028, as follows: "Line one, September 30, 1926, filed information; line two, January 3, 1927, enter order forfeiting bail and for bench warrant." Thereupon the government

rested and defendant moved for a non-suit upon the ground that the government's case showed affirmatively that there was no cause of action, and showed affirmatively that there was a good defense thereto. The motion was denied. Thereupon defendant offered in evidence lines 2, 3 and 4 of the clerk's docket, line 4 being, (Tr. 23) "January 3, 1927, enter order for trial February 8th, 1927"; line 7, reading, "February 8, 1927, entered order trial March 8, 1927"; line 11 reading, "March 9, 1927, entered order trial March 15th, at foot of calendar;" line 4 reading, "March 15, 1927, entered order, cause over term."

Thereupon John P. Lycette was sworn as a witness for the defendant and testified that he is one of the attorneys for the National Surety Company and handled the bail bond forfeitures; that he investigated the records of the company and found that the bond issued by the National Surety Company in this case originally did not have the written words "present term" or "term to term" in it; that no authority was given to put these words in; that the words appear to be in the handwriting of the United States Commissioner; that said words were

not in the bond when it left the office, nor were they put there with the company's consent; that the company has the original bond form with the words "term to term" printed in, if they desire to use a bond of that nature they use the printed form containing these words; that he did not know when the alteration was made except that it was made after it left defendant's office.

Thereupon the information was offered in evidence as exhibit A-2. Both sides rested and the court then entered judgment for the plaintiff, to which an exception was taken.

Formal judgment was thereafter entered (Tr. 13) and an exception thereto taken.

ASSIGNMENTS OF ERROR (Tr. 17)

Errors were assigned as follows:

(1) That the district court erred in refusing to grant defendant's motion for non-suit;

(2) That the court erred in granting judgment for the plaintiff;

(3) That the court erred in refusing to grant judgment for the defendant dismissing the cause.

ARGUMENT

The three assignments of error simply present the question of whether or not the simple and uncontradicted evidence was sufficient to establish the plaintiff's case and warrant judgment for plaintiff, rather than defendant.

NATURE OF SCIRE FACIAS AND PROOF REQUIRED

Scire facias on a bail bond is the commencement of a new and original civil suit or action. The writ is the complaint or declaration and must set up a complete cause of action. The defendant must plead by demurrer or answer, and may set up any defense defeating the right of the plaintiff to have judgment.

Hollister v. U. S., 145 Fed. 773, 779;

Kirk v. U. S., 124 Fed. 324;

Kirk v. U. S., 131 Fed. 331;

Winder v. Caldwell, 14 L. Ed. 487, 491;

U. S. v. Hall, 37 L. Ed. 332; 147 U. S. 687;

Universal Transport Co. v. National Surety Co., 252 Fed. 293;

Davis v. Packard, 8 L. Ed. 684;

Dixon v. Wilkinson, 11 L. Ed. 491;
24 *R.C.L.* 676, Sec. 17;

3 R. C. L. 65, Sec. 80;

35 *Cyc.* 1152-4-8;

Foster on Federal Practice, pp. 2379-83.

In *Kirk v. U. S.,* 124 Fed. 324, it is said at p. 336:

> "In scire facias proceedings properly instituted by due service, the defendant may appear and plead and have a trial of all questions and matters of defense, and the proceeding is but a suit to enforce the penalty of the recognizance, and differs from any other suit to enforce it only in the process by which it is commenced."

The burden of proof is on the plaintiff, and it must prove all the essential allegations of the writ (complaint) by competent evidence. The record on which the writ is issued is not a part of the writ, but must be introduced in evidence to prove the case. When introduced it must support the allegations of the writ or the plaintiff fails. See cases cited above.

Hollister v. U. S., 145 Fed. 773, contains a complete discussion of scire facias. It is there laid down that the record on which the case issues it not a part of the case, but is evidence which must be introduced to prove the case. In that case it is said, after discussing Supreme Court decisions, at p. 780:

> "From the principles announced in the foregoing authorities certain conclusions inevitably follow: First, the record upon which the writ

> issues is not a part of the declaration. *It is the evidence* on which plaintiff must rely to prove the case, and the legal sufficiency of the declaration must be determined, as in ordinary cases of pleading, from the consideration of its averments."

The court then points out, p. 781, that the records must be offered in evidence to prove the facts alleged, saying:

> "The record, when offered to prove the case, must disclose them or the case fails."

It was further held than on a denial the case presents a question of fact requiring a trial by jury.

In *Hunt v. U. S.*, 61 Fed. 795, an action of scire facias on a bail bond, the question arose as to how to prove the allegations of the writ. The court said:

> "A writ of scire facias, when issued, should only recite facts disclosed by the records and files of the court from which the writ emanates. Therefore, when the defendants named in the writ of scire facias, by way of defense thereto, deny any of its recital, *it is incumbent on the plaintiff to verify the same by producing the records and files, and the facts in question cannot be otherwise proven.*"

I.

This Being a Civil Action the Pleadings are Governed by the State Procedure

U. S. Comp. Stat. Sec. 1537;

Revised Stat. Sec. 914.

Rule 10 of the district court provides:

> "In actions at law the pleadings shall be in accordance with the laws of the state as the same shall exist at the time in question * * *"

The Washington statutes require an answer consisting of a general or specific denial, and permits affirmative defense.

Remington's Comp. Stat., Sec. 264:

"The answer of the defendant must contain

> (1) A general or specific denial of the material allegations of the complaint controverted by the defendant * * * (2) A statement of any new matter constituting a defense * * *"

Where affirmative matter is pleaded it requires a reply. *Rem. Comp. Stat.* Sec. 278:

> "If the answer contain a statement of new matter constituting a defense or counterclaim, and the plaintiff fails to reply or demur thereto * * * the defendant may move the court for such judgment as he is entitled to on the pleadings * * *"

In this case the answer was in effect a general denial with affirmative defenses. Paragraph 1 (Tr. 5) admitted the giving of a bond on *February 24th,* but denied the condition of the bond as alleged, and then denies each and every other allegation in the writ.

This required plaintiff to prove every material allegation of the writ.

A. The Plaintiff's Proof Utterly Fails to Establish the Essential Facts Alleged in the Writ

1. *The bond proved was executed and dated at a different time from the bond alleged.*

The writ alleges that a bond was executed on February 24th, 1925, for appearance under certain conditions. The answer admitted (Tr. 5) that the bond was executed on said date, but denied the conditions. The answer further alleges by first affirmative defense (Tr. 5) that the defendant complied with said bond of February 24th. The second affirmative defense (Tr. 6) alleges that the bond of February 24th was complied with by appearance, and the prisoner released on a second bond executed February 27th.

The bond offered in evidence, exhibit 1, (Tr. 26) is dated February 27th, *not* February 24th. When the bond was offered an objection was made (Tr. 21) that the bond was not the bond sued on—that the bond dated February 24th was on file—that the answer filed to that bond had not been controverted. The plaintiff then asked to amend the date from February 24th to February 27th. This was allowed over the defendant's objection and exception.

This was error and constituted a fatal variance.

Farris v. People, 58 Ill. 26;
Eckert v. Phillip, 4 Pa. Co. Ct. 514;
Highsaw v. State, 19 S. W. 762;
Bolinger v. Bower, 14 Ark. 27;
Avant v. State, 26 S. W. 411;
Smith v. State (Miss.) 25 So. 491;
Dailey v. State, 22 S. W. 4;
Brown v. State, 11 S. W. 1022.

In *Avant v. State,* 26 S. W. 411, it was said:

> "The judgment nisi recited that the bond was entered into on July 12th, 1892, whereas the scire facias served upon the parties defendant recites that it was entered into on the 9th of July, 1892. This constitutes a fatal variance."

In *Smith v. State,* (Miss.) 25 So. 491, the rule is stated in the syllabus:

> "A variance between the judgment nisi and the scire facias as to the date of the former is fatal to the judgment final rendered on the latter."

2. *The bond proved is conditioned different than the bond alleged.*

The writ alleges that the bond was conditioned for appearance "during the *May, 1926,* term of said district court and from time to time and term to term thereafter." The bond, exhibit 1, (Tr. 26) is conditioned for appearance "on the ..... day of present term, 1925," and is dated February 27th, 1925, The "present term" would therefore be the November, 1924, term.

Such a substantial variance between the writ and the bond (writ alleges May 1926 term—bond reads present (November 1924) term) is fatal under all of the authorities. See cases cited above.

In 35 *Cyc.* p. 1158 the rule is well stated:

> "A substantial variance between the obligation of record and as recited in the writ from that offered in evidence, or between a pleading and the evidence offered in support thereof, is fatal."

3. The writ alleges (Tr. 2) that the bond was to answer "a charge *exhibited* against the said defendant."

This allegation was essential. 6 C. J. 1064. Plaintiff, however, failed to prove that the charge was "exhibited," and furthermore the evidence shows that though the bond is dated February 27th, 1925, no charge was filed until September 30th, 1926 (Tr. 22, 28, 30).

4. *It is alleged that the defendant was duly called but came not. Proof of this fact is essential to establish a forfeiture.*

U. S. v. Rundlett, 27 Fed. Cas. 16208;

Dillingham v. U. S., 7 Fed. Cas. 3913;
6 *C. J.,* 1072;

Brooks v. U. S., (Okla.) 27 Pac. 311;

Note in 5 *L. R. A.* (N. S.) 402;

State v. Dorr, (W. Va.) 53 S. E. 120, 5 L. R. A. (N. S.) 402;

State v. Kinne, 39 N. Hamp. 138;

Philbrick v. Buxton, 43 N. Hamp. 463.

In *Dillingham v. U. S.* 7 Fed. Cas. 3913, plaintiff failed to prove that the defendant was called. The Honorable J. Washington held this a necessity, saying:

> "We hold it to be essential to the breach of the condition upon which the forfeiture is to arise, that the party who is recognized to appear, shall be solemnly called before his default

> is entered; and even if the default can be proved by the parol evidence of the magistrate before whom the appearance was to be, which we very seriously question, it should clearly be proved that the party was called and warned, *and neglected to appear.* This is far from being a matter of form only, but, on the contrary, is a humane provision to prevent a forfeiture accruing from the ignorance or inattention of the accused."

In *U. S. v. Rundlett,* 27 Fed. Cas. No. 16208, an action on a recognizance, it was said:

> "To maintain an action on a recognizance the declaration must show a breach of the conditions * * * One of these rules of law requires the principal cognizor to be called and his default entered; the legal effect of the condition is such, that it is not broken by non-appearance, generally, to be proved by any evidence, but only *non-appearance* in answer to a call, to be proved by an entry made on the minutes of the magistrate, and returned by him as part of the proceeding. This has been decided in New Hampshire, and elsewhere, upon reasons which to me are satisfactory. *State v. Chesley,* 4 N. Hamp. 366; *Dillingham v. U. S.,* Fed. Cas. No. 3913; *State v. Grigsby,* 3 Yerg. 280; *White v. State,* 5 Yerg. 183; *Clark v. State,* 4 Ga. 329. It is clear also that the declaration must show a default to answer a call, made at a time and place, when and where the cognizor was bound by law to answer."

In *Brooks v. U. S.* (Okla.), 27 Pac. 311, in a suit on a recognizance, it was held, at p. 311:

> "Every precedent in such action, which we have found, indicates that such suits are always based on recognizances duly forfeited by judicial order, and that the declaration in every such case must allege that the defendant in the recognizance was duly called at the proper time and place, and the recognizance forfeited. It is unquestionable that the breach must be established by record, and cannot be shown by proof *aliunde*. *People v. Van Eps.* 4 Wend. 388. It is essential to a breach of the contract of a recognizance that the declaration must show that the party who was to appear was solemnly called and warned."

Did the plaintiff prove that the defendant was called?

Examining the bill of exceptions (Tr. 21) it will be found that the government offered the bond in evidence (Tr. 22), and then it read in evidence two entries from the clerk's docket thus (Tr. 22): "Line one, September 20, 1926, filed information; Line two, January 3, 1927, enter order forfeiting bail and for bench warrant." Thereupon the government rested.

Clearly there was no proof that the defendant was ever called. Under the decisions this was essential to the plaintiff's case.

5. *There was no proof whatsoever that the defendant "came not."*

It was alleged that the defendant failed to appear in answer to the call. Under a general denial it was just as necessary to prove that the defendant "came not" as it was to prove that he was called. Not one scintilla of evidence was offered to prove that the defendant "came not." Without this the case must fail.

6. *There was no proof whatsoever that the surety was called to produce the defendant.* This point was pleaded specially by the defendant (Tr. 11).

The bond (Tr. 26) is joint and several. Therefore it was essential that the surety be called. In 3. R.C.L. p. 62, Sec. 75, it is said:

> "Where the recognizance in its form is several rather than joint, it seems that it is necessary that each recognizance, namely, that of the surety as well as that of the principal, should be separately forfeited in the usual manner. The prisoner should be called to appear, and the bond should be called to bring forth the body of the prisoner whom he undertook to have there that day, or forfeit his recognizance."

7. *There was no proof whatsoever of the judgment nisi.*

Under a general denial it was essential to prove the judgment nisi as alleged. See cases cited above, particularly *Hunt v. U. S.,* 61 Fed. 795; *Nelson v.*

State, 73 S. W. 398; *General Bonding Co. v. State,* 165 S. W. 615; *McWhorter v. State,* 14 Tex. App. 239; *Hollister v. U. S.,* 145 Fed. 773.

In *Hollister v. U. S.,* 145 Fed. 773, it is said, at p. 781, that the record must be offered in evidence to prove the facts alleged:

> "The record, when offered to prove the case, must disclose them (the facts) or the case fails."

In *Nelson v. State,* 73 S. W. 398, the syllabus states the holding of the court as follows:

> "In scire facias on a forfeited bail bond it is essential that the judgment nisi be introduced in evidence."

In *General Bonding Co. v. State,* 165 S. W. 615, it was held that failure to prove the judgment nisi was fatal.

In *Hunt v. U. S.,* 61 Fed. 795, an action of scire facias on a bail bond, it was held that the allegations of the writ must be proved by the records and files, the court saying:

> "A writ of scire facias, when issued, should only recite facts disclosed by the records and files of the court from which the writ emanates. Therefore, when the defendants named in the writ of scire facias, by way of defense thereto, deny any of its recital, *it is incumbent on the plaintiff to verify the same by producing the*

*records and files, and the facts in question cannot be otherwise proven * * *"*

The strictness with which this rule is applied is demonstrated by the numerous cases cited above, to the effect that a variance between the dates of the judgment nisi as alleged and as offered in evidence, is fatal.

Here the government did read from the clerk's docket one line, (Tr. 22) as follows: "January 3rd, 1927, enter order forfeiting bail and for bench warrant." This, however, is not sufficient as it neither states the person, amount, bond, nor condition. This single entry certainly cannot constitute a judgment nisi sufficient to support a scire facias.

In pleading the judgment nisi it is necessary to state with particularity the details concerning the alleged judgment.

In 24 R. C. L. p. 677, Sec. 18, it is said:

> "In scire facias proceedings to revive a judgment, the judgment must be stated with as much particularity as would be required in a complaint or declaration. An immaterial variance in the recital of the judgment is not fatal, but a substantial variance will prevent the continuance of the lien, and a subsequent amendment will not cure it. * * * A scire facias is defective if it fails to state the date of the judgment * * *

> And if the date as it appears of record does not correspond with that of the judgment as set forth in the scire facias, it is such a variance as will authorize the rejection of the record when offered in evidence. So, a substantial variance in the recital of the amount is fatal under the plea of nul tiel record. * * * It is sufficient if the judgment is in substance what it is recited to be."

The proof should at least support the necessary allegations. Here there is no proof of the *amount,* and in fact the proof offered is for no amount whatsoever. It does not show whom the judgment, if any, is against. It is wholly lacking in the essential facts.

Hence the action fails for proof of the facts (judgment nisi) upon which it is predicated.

II.

There Was a Material Unauthorized Alteration of the Bond After Its Execution

An examination of the original bond, exhibit 1, will show certain alterations in ink. These alterations are not disclosed by the printed copy in the transcript.

In the fifth affirmative defense it is alleged (Tr. 8-9):

"That at the time said bond was executed by the National Surety Company, said bond provided for the appearance of said defendant on the ..... date, 1925, and from time to time thereafter; that after the delivery of said bond, and without the knowledge or consent of the National Surety Company, said bond was materially altered and changed by the addition therein of the words 'present term,' and by the addition of the words 'term to term'; and that said National Surety Company is informed and believes that said additions were made in ink thereon, after the delivery of said bond, by R. W. McClelland, the United States Commissioner, to whom the said bond was offered for approval; that said changes were made without the authority or approval of the National Surety Company; that said alterations and changes increase and enlarge the liability of the National Surety Company and are material alterations; that by reason of said changes and alterations, material in character, the liability of the National Surety Company on said bond was and is terminated, and said bond became null and void."

No reply was made to this defense. Under *Rem. Comp. Stat. of Washington,* Sec. 264 and 278, quoted above, a failure to reply admits the allegations of the affirmative defense. See also *Johnson v. Maxwell,* 2 Wash. 482, 25 Pac. 570; *Smith v. Ormsby,* 20 Wash. 356, 55 Pac. 570; and *Pierce v. Brown,* 7 Wall. 205, 19 L. Ed. 134.

These allegations proved. These allegations were proved by uncontroverted evidence (Tr. 3-4); that

at the time the bond was executed by appellant, it did not contain the words "present term" or the words "term to term"; that these were added by some one after the bond left appellant's office, and were added without authority from appellant.

The words added are in ink, and appear to be in the handwriting of the commissioner before whom the bond was taken.

WHERE ALTERATIONS OR INTERLINEATIONS ARE MADE IN AN INSTRUMENT IN HANDWRITING DIFFERENT FROM THE REST OF THE INSTRUMENT, THEY ARE PRESUMED TO HAVE BEEN MADE AFTER EXECUTION. THE BURDEN IS ON THE PARTY OFFERING THE INSTRUMENT TO EXPLAIN THEM.

Cox v. Palmer, 3 Fed. 16;

Note in 236 *Fed.* 237;

Zeigler v. Hallahan, 131 Fed. 205;

A material alteration discharges the sureties. 6 C. J. 1026;

Reese v. U. S., 19 L. Ed. 541;

U. S. v. Backland, 33 Fed. 156.

In 6 *C. J.,* 1026, it is said:

"A material alteration of the bond or recognizance after its final execution, either by erasures or striking out or adding to the same, with-

> out the sureties' knowledge or consent, releases them."

Citation of authority is hardly necessary for the proposition that a material alteration of a bond after execution renders it void. Here there is clearly an alteration unexplained by the plaintiff, and proved by defendant to have been made after execution. This discharges the surety.

III.

The Bond is Void Because No Time is Stated for Appearance.

It appears from an examination of the bond (Tr. 26), as alleged in the third affirmative defense, (Tr. 7) that the bond is conditioned that the defendant appear and answer as follows:

> "On the ..... day of ..... term, to be begun and held in the City of Seattle in said district, on the ..... day of the present term, 1925, and from time to time and term to term thereafter."

1. As pointed out above, the words "present term" and "term to term" were added after the bond was executed. Without those words there would be no date whatsoever for appearance. And under the cases cited below, this renders the bond void.

Even with the words in the bond, there is no definite time for appearance, and hence the bond is void.

In *Joelson v. U. S.,* 281 Fed. 106, (CCA) the court had under consideration a bond containing blanks, very similar to the one here in question. The bond is set out in the opinion. The court held that it was too indefinite to support a judgment, saying at p. 108:

> "The recognizance provided that Rosen should appear 'on the first day of ..... term to be begun and held at ....., on the ..... day of 192.., at .... o'clock .... M., and from time to time thereafter, to which the case may be continued * * * then and there to abide the judgment of said court and not depart without leave thereof.' It appeared, therefore, that the recognizance did not require Rosen to appear at any particular place or time.
>
> "Like other contracts, it (bond) must be construed according to its express terms, and where it is defective as to the place and time at which defendant is to appear, these may not be supplied by intendment * * * If the place and time of appearance by defendant are not expressly stated in a recognizance, and these cannot be fixed by other terms in it, the omission is fatally defective (citing cases.) * * * Under the terms of the contract, Rosen was under no obligation whatsoever to appear at any time or place before the court. The omission of the condition was a fatal defect, and the recognizance was a nullity."

IV.

The Defendant Was Not Called At Any Time Covered by the Bond.

The bond is dated February 27th, 1925. When executed it did not require the defendant to appear from "term to term," but merely required defendant's appearance at the "..... day of present term, 1925." The writ alleges that the bond was conditioned for appearance at the "*May* 1926 *term.*" This is clearly erroneous as shown by government's exhibit 1 (Tr. 26).

No information was filed until September 30, 1926 (Tr. 22-28). Defendant was not called (if called at all) until January 3, 1927, or nearly two years after the giving of the bond.

Thus, the defendant was not called during the "present term, 1925," which was the November, 1924, term, as required in the bond. The information itself was not even filed until more than a year and a half after the giving of the bond.

The defendant was not called until five terms after the date set for appearance in the bond.

Under this form of bond the sureties were not obligated to produce the defendant at any term

other than the "present term 1925" (November 1924 term).

U. S. v. Mace, 281 Fed. 635 (8 CCA);
U. S. v. Keiver, 56 Fed. 422;
U. S. v. Backland, 33 Fed. 156;
Reese v. U. S., 19 L. Ed. 541;
6 *C. J.* 1035; 1038;
3 *R.C.L.* p. 41, Sec. 47;
Arnstein v. U. S., 296 Fed. 946;
Joelson v. U. S., 281 Fed. 106; (CCA 3)
Colquitt v. Smith, 65 Ga., 341;
Goodwin v. Governor, 1 Stew. & T. (Ala.) 465;
State v. Becker, (Wis.) 50 N. W. 178;
Lane v. State, (Kan.) 50 Pac. 905;
Commonwealth v. Summers, 14 Pa. Co. Ct. 159;
State v. Dorr, (W. Va.) 53 S. E. 120;
State v. Mackey, 55 Mo. 51;
Ramey v. Commonwealth, 6 Ky. L. Rep. 524;
Swank v. State, 3 O. St. 429;
Hesselgrave v. State, (Neb.) 89 N. W. 295;
Sampson v. Harris, (Ga.) 94 S. E. 558;
Collins v. Smith, 67 S. E. 847;
Gebhart v. Drake, 24 O. St. 177;
State v. Moore, 57 Mo. App. 662;

State v. Murdock, (Neb.) 81 N. W. 447;
Perkins v. Nilson, (Neb.) 90 N. W. 756;
Townsend v. People, 14 Mich. 388.

In *U. S. v. Mace,* 281 Fed. 635 (8 CCA) the court had under consideration a bond nearly identical to the one here in question. The bond is set out at length at page 636. It was conditioned to appear on the first day of the term and time to time as continued. The bond was given September 21st, 1918, during the April 1918 term. On December 19th, 1918, a new term was called, and the bond was forfeited. It was held the bond required the defendant to appear only in the term mentioned, the court saying, p. 639:

> "The bond here under consideration called for the appearance of C. at the April term, 1918, of the United States District Court, being the term in session at the time the bond was given. The amended petition filed by the government alleges that C was called for trial December 19th, 1918. This was the September term, 1918, a term distinct and separate from the April term. The forfeiture was entered at the September term. At that time the bond had no vitality. It may be conceded that a mistake was made in the date of the bond, and the error is an unfortunate one for the government, but this court must take the bond as it finds it and construe it according to law. It would not be far afield to hold the bond void for uncertainty.

> The only way it can be sustained at all is to uphold it as a bond applying to the term of court in session, and limiting its life to that term."

In *U. S. v. Keiver,* 56 Fed. 422, the bond was conditioned for appearance at a certain term. The defendant was not called. It was held that his bond could not be forfeited at some subsequent term after two regular terms had elapsed at which the defendant might have been tried, the court saying, at p. 426:

> "And if he (judge) can pass over two general terms of the court at which the prisoner might be tried, there is no reason why he might not pass over three or any number of terms."

In the case at bar, the case was continued over five terms, thereby greatly and inequitably enlarging the obligation of the surety.

In *U. S. v. Backland,* 33 Fed. 156, it was held that where a bond is conditioned for appearance at one term and no indictment or information is filed, the bond is discharged and cannot be held for appearance during the following term.

In 6 *C. J.,* 1035, it is stated:

> "As a general rule, when the bond or recognizance specifies the term and place at which

the accused is to appear, he is not bound to appear, and the bond or recognizance cannot be forfeited for his failure to appear at any other term or place. Thus in such a case he is not, as a general rule, bound to appear before any other court, or at any other place, or during any other term or day than that specified in the undertaking; and it has been held that if the time of holding the court is subsequently changed from the day set for it, a failure to appear on the day to which it is changed does not operate as a forfeiture."

And so, at page 1038:

"But where the obligation of the bond is not a continuing one, (term to term), the bail are entitled to discharge at the term designated for appearance. Thus, it has been held, that, where the condition is for appearance at the next term and from day to day, it applies only to that particular term of court, and that an adjournment to a subsequent term is not within the contract of the recognizance, and operates to discharge it."

In 3 *R. C. L.*, p. 41, Sec. 47, it is stated:

"Ordinarily recognizances or bail bonds obligate the surety to procure the appearance of their principal at the next, and not at any subsequent term. Where recognizance in a criminal case is conditioned 'that the principal appear at the next term and thereafter from day to day and not depart without leave,' or contains the further condition that he 'shall abide the judgment of the court,' the surety is bound for the appearance of the prisoner during the first term of the court only, and if court adjourns without making any order, the sureties are exonerated from their recognizance."

In *Reese v. U. S.,* 19 L. Ed. 541, the bond was conditioned "from term to term." It there appeared that the case was continued nearly two years. The court held that even though the bond was conditioned from term to term, the unreasonable and long delay operated to discharge the surety.

V.

Bail Discharged Under the Law

The conditions of a bail bond in a federal court are governed by the law of the state in which the federal court is located.

Rev. Stat., Sec. 1014, Comp. Stat. Sec. 1674;

U. S. v. Ewing, 140 U. S. 142, 35 L. Ed. 388;

U. S. v. Patterson, 150 U. S. 67; 37, L. Ed. 997;

U. S. v. Keiver, 56 Fed. 422;

U. S. v. Mace, 281 Fed. 635;

U. S. v. Sauer, 73 Fed. 671;

U. S. v. Zarafontias, 150 Fed. 97;

U. S. v. Case, Fed. Case No. 14742;

U. S. v. Maresca, 266 Fed. 713;

U. S. v. Horton, 26 Fed. Cas. No. 15393.

Sureties Discharged Under Washington Decisions

Rem. Comp. Stat. of Washington provide:

Sec. 2311: "Whenever a person has been held to answer to any criminal charge, if an indictment be not found or information filed against him within thirty days, the court shall order the prosecution to be dismissed, unless good cause to the contrary be shown."

Sec. 2312: "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown."

Under the above statutes and rules the court should adopt the decision laid down by the Supreme Court of the State of Washington in *State v. Lewis,* 35 Wash. 261, 77 Pac. 198, which was affirmed in *State v. Caruso,* 137 Wash. 519, at 529, 243 Pac. 14. In *State v. Lewis* the defendant was admitted to bail on May 25th, 1901. No information was filed until October 9th, 1901. Prior to that time the defendant moved the court to dismiss the action for failure to file the information. But this court declined to do so because the defendant did not personally appear in court. On October 14, 1901, the bail was forfeited for failure of the defendant to appear. On December 2nd the case was dismissed.

The sureties appealed from the judgment against them on the bail bond. The court held that the

statutes of Washington required the filing of an information are mandatory; that unless this is done the bail is discharged. This was so held even though the forfeiture took place before the case was dismissed. The court, after quoting the statutes above set forth, held, p. 268:

> "The same line of reasoning, when applied to the above section, 6910 (Sec. 2311 *supra*), *clearly* implies that the provisions of this section are mandatory; that, 'if an indictment be not found or information filed against him (the defendant) within thirty days, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown'; that such cause should appear, or be shown by, the record, unless waived in some manner by the defendant or accused. In other words, when the indictment shall not have been found, or information filed, within thirty days after the defendant has been held to answer a criminal charge, the prosecution must assume the burden of showing a reasonable excuse or justification for its omission to do so. Otherwise, the defendant is entitled to his discharge, and a dismissal of the prosecution, as a matter of right.
>
> "When it shall have been determined that such right to discharge and dismissal exists in defendant's behalf, it would seem logically to follow that this right inures to the advantage of the sureties on the defendant's bail bond."

The court then quotes from a California decision to the same effect, and continues, (p. 269):

"There are authorities holding that, where a bail bond has been executed by defendant and sureties, conditioned that the bail shall appear at the next term of the court named in the instrument, to answer a criminal charge, and continuances are had from term to term without the finding of any indictment or the presentment of any information against the principal, such delays are sufficient in law to release the sureties from liability on the recognizance. (Citing cases).

"Bail bonds should be construed with reference to the laws of the sovereign jurisdiction where given, while the liability of principal and sureties is to be measured by the terms of the bond, the obligors, especially the sureties, have the right to expect and insist that the prosecution observe the mandates of the statutes * * *

"The record fails to show any good cause for the neglect on the part of the state, to file the information until October 9th, 1901, more than three months after the expiration of the time limited. If the state can omit the performance of so important a duty for three months, why may it not do so for six months, or for an indefinite period, and in the meantime insist upon the forfeiture of defendant's recognizance? We cannot conceive this to be the law. True, the surety may seize the person of their principal and surrender him into the custody of the law, and thus exempt themselves from further liability. Still, we think that they should not be mulcted simply because they omitted to do so, having acted on the presumption that the prosecution would discharge its duties as required by the statute, or that otherwise it had elected to abandon such prosecution."

In the case at bar, the bond was given February 27th, 1925, the information was not filed until September 30th, 1926. Consequently, the bail should be discharged under the statutes cited.

The defendant was not called for trial, if at all, until January 3rd, 1927, nearly two years after being admitted to bail, and more than sixty days after the filing of the information. Under the statutes quoted, the bail should be discharged.

If the defendant and his surety can be held for nearly two years, there is no limit to their liability. Such a proposition is unreasonable.

Decisions of the state courts, construing state statutes, are binding rules of decision for the federal court. *Rev. Stat.* 721 *Comp. Stat.* 1538.

The holding of *State v. Lewis, supra* was affirmed in *State v. Caruso,* 137 Wash. 519, at p. 529, 243 Pac. 529, and the court again held that these statutes are mandatory.

VI.

The Forfeiture Was Premature

It was alleged in the answer (Tr. 11) and proved (Tr. 23) that the action was set for trial on several

dates after January 3rd, the alleged date of the forfeiture. Certainly the bail should not be forfeited where the case is set for trial at a time subsequent to the date of the forfeiture.

VII.

The Bond Was Void For Failure to Designate Any Crime. (*Sixth Affirmative Defense*)

The bond required the defendant to appear "to answer the charge of having on or about the .... day of ..... A.D. 192.., within said district, in violation of section .... of the ..... (Act of ....) (Criminal Cade) (R.S.) of the United States, unlawfully violating the National Prohibition Act."

It is true that the offense need not be set out in any technical terms, but it must sufficiently describe it so as to inform the defendant and his surety what he is held to answer. This is particularly true when the information has not been filed at the time the bond is given.

Here the charge is simply violating the National Prohibition Act. This might be any one of a large number of crimes ranging from a felony (conspiracy) to a misdemeanor, and might be within any time covered by the statute of limitations. No time or

place is mentioned in the bond. The bond was, therefore, insufficient.

In 6 C. J. p. 1000, it is said:

> "Where the offense is not a crime eo nomine, or, in other words, has no specific name, charging by name is insufficient, but its essential elements must be specified and set out."

VIII.

The Sureties Were Relieved Because the Information Charges a Different Crime Than That Set Forth in the Bond

If the bond describes any offense, it must relate to a single offense. Yet, the information (Tr. 28) charges the defendant in separate counts of *two* separate and distinct crimes.

This surety did not contract to produce the defendant for any and all offense which the government might desire to prosecute him for. The defendant might well appear to answer one crime, but not two or three or six charges. The risk of the surety being enlarged and increased, he is discharged.

6 C. J. 1001-2, 1029;

Dillingham v. U. S., 7 Fed. Cas. p. 708, No. 3913;

In 6 C. J., p. 1001, it is said:

> "In the absence of statute otherwise, where the offense stated in the bail bond or recognizance is different from that with which the accused stands charged, it will invalidate the undertaking, unless the variance is an immaterial one."

So, also, at p. 1002, it is said:

> "If the variance (between the bond and information) is a substantial one, and the bond or recognizance names or describes a different offense than that charged in the indictment, although it describes one of the same general class or nature, the sureties will not be bound."

SUMMARY

We respectfully submit that the judgment should be reversed and the cause remanded with instructions to dismiss the action, because:

(1) The bond proved was executed and dated at a different time than the bond alleged;

(2) The bond proved is conditioned different than the bond alleged:

a. The bond alleged is for appearance during the May 1926 term; the bond proved was for appearance in the November 1924 term;

b. The bond proved is a "time to time" bond; the bond alleged was a "term to term" bond;

(3) There was no proof whatsoever that the defendant was called;

(4) There was no proof whatsoever that the defendant "came not," if actually called;

(5) There was no proof whatsoever that the surety was called to produce the defendant;

(6) There was no proof whatsoever of the judgment nisi;

(7) There was a material unauthorized alteration of the bond after execution;

(8) The bond is void because no time is stated for appearance of the defendant;

(9) The surety is discharged because the defendant was not called, nor was any information filed until five terms after the date set for appearance;

(10) The bond was void for failure to designate any crime;

(11) If the bond charges any crime, the sureties are relieved because the information charges a different crime than set forth in the bond.

Respectfully submitted,

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